Mar 9 2000

Supreme Court, U.S.
FILED
MAR - 9 2000
CLERK

No. 99-5525

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF COURT-APPOINTED AMICUS CURIAE URGING AFFIRMANCE OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether a voluntary confession may be admitted into evidence in the government's case-in-chief under 18 U.S.C. 3501 where the confession was not preceded by the warnings specified in *Miranda v. Arizona*, 384 U.S. 436 (1966).

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STATEMENT

The facts of this case and proceedings below have been adequately summarized by the parties. We emphasize only that this case is before this Court with a district court finding that petitioner Dickerson's incriminating statements were voluntary. J.A. 155, 158, 212.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The ultimate question in this case is whether the federal criminal justice system must exclude from evidence a criminal suspect's voluntary statement, despite an Act of Congress to the contrary. *Miranda v. Arizona*, 384 U.S. 436 (1966), automatically excludes such a statement if it was given in response to custodial questioning without the required warnings. It enforces that exclusion on the basis of an irrebuttable presumption that such questioning by police must in every case have coerced the confession. This presumption controls regardless of how frequently it is false; regardless of how much it costs the integrity and truthfulness of the trial, if a trial is still possible; and regardless of how abundant the evidence may be in a particular case that the suspect understood his situation and made his own decision to speak. Nothing in the Constitution requires this uncompromising rule or strips the elected branches of their authority to modify it.

Congress' decision to enact Section 3501 was consistent with the Constitution. *Miranda* did not, and of course could not,

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[1] The case at this stage presents no challenge to the way in which 18 U.S.C. 3501 was raised below. In the district court, career prosecutors argued that Section 3501 required reconsideration of the court's decision suppressing Dickerson's confession. J.A. 94-6. On appeal to the Fourth Circuit, the prosecutors' superiors in the Department of Justice did not permit them to continue pressing that position. This led the Washington Legal Foundation to seek and obtain leave of the court to brief and argue as amicus curiae in defense of the statute, a defense which was successful. J.A. 184-85. Dickerson's petition for certiorari also sought review of the question whether Section 3501 was "properly raised" below, but the Court declined to consider the issue.

simply redraft the Fifth Amendment to include a new constitutional right (or, as the *Miranda* Court put it, create a "constitutional straitjacket," 384 U.S. at 467) prohibiting the use of unwarned, though voluntary, statements. Later pronouncements by the Court have confirmed that *Miranda*'s exclusionary rule was instead a preventive measure — part of a "series of recommended procedural safeguards," *Davis v. United States*, 512 U.S. 452, 457-458 (1994), that "sweep[] more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985). Because *Miranda*'s exclusionary rule was in this sense judicially improvised, rather than constitutionally required, *Miranda* necessarily accommodates legislative modification. Accordingly, there is neither need nor reason to overrule *Miranda* in order to uphold Section 3501.

The benefits of *Miranda* are preserved virtually intact by Section 3501. There is ample reason to conclude that *Miranda* warnings will remain a standard law enforcement practice, because the statute, as well as numerous other legal rules, makes it very much in every officer's interest to continue to give them. What Section 3501 changes is not so much the officer's incentive to give warnings, but rather *Miranda*'s draconian remedy for any defect in giving them (or, as here, just in proving they were given). As Congress understood, the *automatic* character of *Miranda's* exclusionary rule is excessive because, heedless of the costs, it excludes confessions that manifestly were not produced by the police coercion that was *Miranda*'s principal target.

So long as *in*voluntary confessions remain banned, as they are under Section 3501, and so long as trial courts are empowered without limitation to examine and thwart any police behavior that produces involuntary confessions — again as they are under the statute — *Miranda*'s automatic exclusionary rule is unnecessary to preserve the full breadth of a suspect's Fifth Amendment right not to be compelled to be a witness against himself. Because *Miranda's* automatic rule excluding *unwarned* statements extends beyond the Fifth Amendment's bar on *actually compelled* statements, Congress was free to balance for itself the costs and benefits of that automatic rule, and to supersede it with a rule

more in keeping with the facts of each case and more faithful to the text of the Fifth Amendment.

In Section I below, we show that Congress had the authority to modify *Miranda*'s exclusionary rule as it did in Section 3501. The rule was an exercise by the Court of its power to devise, in the absence of legislation, prophylactic measures that may extend beyond constitutional requirements in order to protect the underlying constitutional right. In cases such as *New York v. Quarles*, 467 U.S. 649 (1984), *Harris v. New York*, 401 U.S. 222, 224 (1971), and *Oregon v. Hass*, 420 U.S. 714, 722 (1975), the Court has made clear that there is "no constitutional imperative," 467 U.S. at 658 n.7, requiring the exclusion of an unwarned yet voluntary statement. Section 3501 is built on this understanding, while fully honoring the requirements of the Fifth Amendment by continuing a blanket ban on involuntary confessions. Nothing in the Constitution provides grounds for the Court to invalidate the decision of Congress to modify the overprotective and extraconstitutional features of the court-devised rule.

In Section II, we show that even if the judicial branch properly may require some measure of prophylaxis beyond what the Constitution requires, Section 3501, taken together with the considerable development over the last 34 years of other statutes, rules and remedies regulating police behavior, amply provides the needed measure of protection. By listing the rendition of warnings as a factor a court *must* consider in making voluntariness determinations, Section 3501 itself provides strong incentives for federal officers to continue delivering warnings. Moreover, Section 3501 should not be examined in a vacuum. Congress has bolstered the protections the statute provides with other rules such as a 1974 provision allowing suits against federal agencies that produce coerced confessions. These measures, along with post-*Miranda* judicial doctrines like *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and improved training of federal law enforcement officers, adequately protect Fifth Amendment values.

In Section III, we show that, whether or not Section 3501 supersedes *Miranda* of its own force, the Court itself should modify

Miranda's irrebuttable, but certainly factually incorrect, presumption that every unwarned confession is *ipso facto* involuntary and hence must be excluded. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that when Congress legislates to protect constitutional rights, its remedy should be both congruent and proportional to the evil it aims to address. Applying the proportionality standard to the Court's prophylactic rules, it follows that the now-automatic exclusionary rule of *Miranda* should be changed to allow the government to prove, if it can, that in a given case an unwarned or imperfectly warned statement was nonetheless a product of free will.

ARGUMENT

I. SECTION 3501 IS A PERMISSIBLE RESTRUCTURING BY CONGRESS OF A PROPHYLACTIC RULE THAT SWEEPS MORE BROADLY THAN THE CONSTITUTION.

The question whether *Miranda*'s automatic exclusionary rule or Section 3501 governs the admissibility of confessions turns on whether *Miranda*'s rule is constitutionally required. If it is, then plainly Congress could not change it. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). If otherwise — if instead it is, as the Court often has stated, a judicially-devised remedy that "serves" the Fifth Amendment but "sweeps more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) — then it is equally plain that Congress does have the power to modify it. *See Smith v. Robbins*, 120 S.Ct. 746 (2000); *Palermo v. United States*, 360 U.S. 343 (1959). Congress may substitute a different remedial regime so long as that regime honors what the Constitution requires.

The court below determined that *Miranda*'s exclusionary rule is not constitutionally required, and that Section 3501 is a permissible modification.[2] Both conclusions are correct.

A. *Miranda* Did Not Create a New Constitutional Right Empowering the Defendant to Exclude at Trial His Unwarned, But Voluntarily Given, Statement

The *Miranda* rule "is not itself required by the Fifth Amendment's prohibition on coerced confessions . . . ." *Davis v. United States*, 512 U.S. at 458. This conclusion is supported by the text and history of the Fifth Amendment, the structure of the *Miranda* decision, and numerous subsequent holdings from the Court interpreting *Miranda*.

1. *Miranda* Created Non-Constitutional, Prophylactic Rules

Until 1966, no special rule governed the admissibility in federal court of incriminating statements made by a suspect in police custody. Instead, as the court below explained, the approach regarding such statements "remained the same for nearly 180 years: confessions were admissible at trial if made voluntarily." J.A. 194. *See generally* JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 87-144 (1993); *Dept. of Justice Office of Legal Policy, Report to the Attorney General on the Law of Pretrial Interrogation, reprinted in* 22 U. MICH. J.L. REF. 437, 453-91 (1989) ("*DOJ Report*"). In 1966, however, the Court considered whether there should be additional protection for a suspect during

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[2] The other courts that have squarely decided the issue have reached the same conclusion as the court below. *See United States v. Crocker*, 510 F.2d 1129, 1136-38 (10th Cir. 1975) (alternative holding); *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1430-36 (D. Utah 1997); *United States v. Tapia-Mendoza*, 41 F.Supp.2d 1250, 1256 (D. Utah 1999); *but cf. United States v. Cheely*, 21 F.3d 914, 923 (9th Cir. 1994) (two-sentence conclusion that Section 3501 does not "trump" *Edwards v. Arizona*).

custodial police questioning. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court concluded that in such circumstances, the voluntariness rule should be supplemented with the now well-known warnings and waiver procedure.

The parties view these supplements as virtual — although they concede, not actual — requirements of the Fifth Amendment's prohibition against any person being "compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. They are then left to wonder about the conceded "tension" their view creates with numerous later cases repeatedly emphasizing that those safeguards are "not themselves rights protected by the Constitution," *e.g.*, *New York v. Quarles*, 467 U.S. 649, 654 (1984) (internal quotation omitted). Govt. Br. at 39. The parties make no effort to sketch a consistent theory that would reconcile the holdings of these later cases, *see infra* at p.16, n.10, with the features of those cases (*Miranda*'s application to the states and the like) that the parties favor. The failure to advance a reconciling theory, or any theory specifically explaining *Miranda*'s constitutional basis, is the conceptual black hole in the parties' case. Their failure to resolve this central analytical issue impeaches the fundamentals of their claim that *Miranda* is immune from legislative change.[3]

There is certainly language in *Miranda* that can be read as imposing constitutional requirements. *See* Pet. Br. at 18-20. But even without reference to later opinions that remove any doubt, *Miranda* is better read as creating safeguards rather than establishing previously unseen requirements of the Fifth Amendment itself.

The *Miranda* Court stated that it had no intention of "creat[ing] a constitutional straitjacket." *Miranda*, 384 U.S. at 467. This disclaimer is difficult to explain if the Court believed the specific rules it announced were ordained by the Constitution.

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[3] Dickerson does at times appear to offer a theory of *Miranda*, albeit one that cannot and does not seriously purport to survive *Quarles* and similar cases. Pet. Br. at 22-27. The Department offers no theory.

The opinion characteristically speaks of the "potentiality" of compulsion and the need for "appropriate safeguards" designed "to insure" that statements are the product of free choice, as well as the possibility of Fifth Amendment rights being "jeopardized" by custodial interrogation. 384 U.S. at 457, 479. But potential compulsion is different from actual compulsion; jeopardizing Fifth Amendment rights is different from violating them; and assuring that Fifth Amendment rights are protected is different from concluding that they are always infringed without those protections. *Miranda's* rationale is, therefore, prophylactic in precisely the sense the Court's later cases have used that term.

2. The Court's More Recent Decisions Leave No Doubt that Compliance with *Miranda*'s Rules is not a Constitutional Prerequisite for Admitting Confessions

More than a quarter century of this Court's jurisprudence, starting with *Michigan v. Tucker*, 417 U.S. 433, 443-444 (1974), establishes beyond argument that the Constitution does not require *Miranda* warnings. Still less does it require the rule that a demonstrably voluntary confession must be excluded simply because the warnings were absent, defective as to some particular, or (as here) inadequately proved because of a later prosecutorial misstep unrelated to the suspect's questioning. Rather, *Miranda*'s rules were, as the Court often has said, put forth as "a series of recommended procedural safeguards," *Davis v. United States*, 512 U.S. at 457-458, that are "not themselves rights protected by the Constitution" and are "not constitutional in character," *Withrow v. Williams*, 507 U.S. 689, 690-691 (1993); *see Oregon v. Elstad*, 470 U.S. at 306-07. The *Miranda* rules "are preventative and do not . . . stem from violations of a constitutional right." *Arizona v. Roberson*, 486 U.S. 675, 691 (1988) (Kennedy, J., dissenting).

This view of *Miranda's* rules as judicially crafted safeguards rather than constitutional rights is no mere loose shorthand. The

holdings of three of the Court's most important *Miranda*-related cases rest directly on *Miranda's* non-constitutional status. In each of those cases, the Court allowed the admission into evidence of un-Mirandized but voluntary confessions. In *New York v. Quarles*, 467 U.S. 649, 654 (1984), the Court held that an incriminating statement obtained by police questioning of a rape suspect they had just captured was admissible despite the failure to give *Miranda* warnings. Similarly, in *Harris v. New York*, 401 U.S. 222, 224 (1971), and *Oregon v. Hass*, 420 U.S. 714, 722 (1975), the Court held that statements obtained in violation of *Miranda* could be used to impeach the testimony of a defendant who took the stand. The Court reasoned that the central truth-seeking purpose of the trial would be too far undermined if the defendant were permitted to keep from the jury his previous voluntary, though un-Mirandized, account.

The basis for these rulings was that *Miranda*'s exclusionary rule is not constitutionally required. Other considerations — including, significantly for purposes of this case, a reluctance to put the public safety at risk or to allow distortion of the truth — could take precedence over that rule, which rested on a *policy* decision by the *Miranda* majority to bolster the Fifth Amendment with an additional layer of protection. *See Quarles*, 467 U.S. at 658 n.7; *Hass*, 420 U.S. at 721-24; *Harris*, 401 U.S. at 224-26.

The competing theory of *Miranda*'s exclusionary rule is that un-Mirandized statements are excluded because the failure to give the suspect warnings means his statements are *necessarily* "compelled" as that term is used in the Fifth Amendment. *See* Pet. Br. at 19. This theory cannot be squared with these decisions. Under that reading, *any* use of an un-Mirandized statement at trial, including the ones allowed in *Quarles*, *Harris*, and *Hass* would also have to be barred, since those uses too would amount to "compelled" self-incriminating testimony. *See Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978); *New Jersey v. Portash*,

440 U.S. 450, 458-59 (1979).[4] Accordingly, the Court's admission of un-Mirandized statements in *Quarles*, *Harris*, and *Hass* proves that *Miranda*'s rule excluding unwarned but voluntary statements is not required by the Constitution.[5] That is the starting point from which to analyze Congress's authority to adopt Section 3501.

B. The *Miranda* Rules are Best Viewed as an Exercise of the Court's Power to Craft Safeguards for Constitutional Rights in the Absence of Legislative Action

The parties argue that the statute cannot stand because it adopts an approach different from what is said to be *Miranda's* constitutionally "based" regime. Conspicuously absent from this analysis is any specific explanation of what *Miranda's* constitutional "basis" is. Instead, the parties employ gossamer phrases to the effect that, for example, *Miranda* has "constitutional dimension,"

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[4] While emphasizing at length the importance of stare decisis (*see* Pet. Br. at 30-45; Govt. Br. at 29-49), the parties fail to explain how, without overruling *Quarles*, *Harris* and *Hass*, the Court could conclude that the Constitution requires the suppression of an unwarned but voluntary statement. To pass off *Quarles* as the "public safety exception" to *Miranda* of course explains nothing. The question is not whether *Quarles* is such an "exception," but under what principle of law that or any exception is possible. *Miranda's* exclusionary rule is no more and no less "constitutionally based" when public safety is at stake than at any other time. And certainly neither public safety nor anything else could authorize the prosecution to use as evidence a statement obtained by what the Fifth Amendment actually forbids, namely compulsion. *See Mincey*, 437 U.S. at 398 ("*any* use criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law) (emphases in original).

[5] These three cases are by no means the only ones reaching such a conclusion. For example, another well-developed line of cases allows evidence derived from statements obtained in violation of *Miranda* to be used because *Miranda*'s "procedural safeguards were not themselves rights protected by the Constitution," *Michigan v. Tucker*, 417 U.S. 433, 444 (1974), and "may be triggered even in the absence of a Fifth Amendment violation," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

Pet. Br. at 25, or that *Miranda* represented "an exercise of this Court's authority to implement and effectuate constitutional rights . . . ." Govt. Br at 6. A more determined effort to understand *Miranda*'s actual status demonstrates, however, that Section 3501 is compatible with *Miranda's* legal foundations. Accordingly, there is no need to overrule *Miranda* in order to uphold the statute.

Miranda's exclusionary rule is best understood as an exercise of the Court's authority to improvise measures to assist in the protection of constitutional rights where neither the Constitution nor the legislature has specified a particular mechanism for protecting those rights. *See, e.g., Bivens v. Six Unknown Agents*, 403 U. S. 388 (1971); *Mapp v. Ohio*, 367 U.S. 643 (1961).[6] The judicially devised regime may and sometimes does sweep more broadly than is strictly necessary to vindicate the right involved, *Bivens*, 403 U.S. at 397; *see also id.* at 406-08 (Harlan, J., concurring).[7] Because the Court has crafted such measures to protect constitutional rights against infringement by the states as well as the federal government, *see, e,g., Mapp*; *Bush v. Lucas*, 462 U.S. 367, 374-75 (1983), this understanding of *Miranda*'s exclusionary rule is consistent with its application to the states.

Since *Miranda*'s exclusionary rule is not a requirement of the Fifth Amendment, but is instead, in the mold of *Bivens*, an exercise of the Court's power to improvise a more sweeping, albeit prophylactic, measure designed to assist in protecting Fifth

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[6] The search and seizure exclusionary rule is different from *Miranda's* because it is a remedy for *actual violations* of the Fourth Amendment. Adopting an analogous approach in the Fifth Amendment context would mean suppressing evidence only in cases in which a defendant's constitutional right against compelled self-incrimination has actually been violated. This is precisely the approach of Section 3501.

[7] The crafting of interim remedies not themselves required by the Constitution, but designed in the absence of legislation to assist in protecting constitutional rights, has become known as the exercise by the Court of the power to create "constitutional common law." *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 42 (1975).

Amendment rights, it follows that Congress had the authority to modify it. The existence of such authority is presumed throughout *Bivens* itself, for example, and lies at the heart of the Court's later holding in *Bush v. Lucas*, 462 U.S. 367 (1983). In that case, the Court refused to allow a *Bivens* remedy for money damages in an action by a federal employee for the government's breach of his First Amendment rights. The Court concluded the *Bivens* remedy was precluded because Congress had provided for a different remedy — not including money damages — through various federal personnel statutes. In *Bush*, the Court reached this conclusion while assuming that civil service remedies were *not* as fully effective as a *Bivens* remedy would be either in compensating the plaintiff or in deterring the unconstitutional exercise of authority by supervisors. 462 U.S. at 372-73, 377. According to the Court, the touchstone for assessing the constitutionality of the remedial regime Congress chose was not the judicially-devised regime for which it substituted. Rather, the touchstone was whether the congressional regime provided "meaningful" relief for the constitutional violation at issue. *Id.* at 368, 386. If it did, then how it compared to the judicially-devised scheme was irrelevant. *Id.* at 368, 386-90; *see also Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (remedial regime replacing judicially-devised one upheld because it contained "meaningful safeguards" for the constitutional rights at issue even though it failed to provide as "complete relief" as a *Bivens* remedy).

Analogously, in *Smith v. Robbins*, 120 S.Ct. 746 (2000), the Court upheld as constitutional a state scheme concerning withdrawal by appointed appellate counsel when faced with a frivolous appeal. The issue, the Court declared, was "what is constitutionally compelled," *id.* at 763, not how closely the state's procedure — indeed the only procedure — resembled the procedure the Court suggested in *Anders v. California*, 386 U.S. 738 (1967). The *Robbins* Court warned that "any view . . . that converted [the *Anders* procedure] from a suggestion into a straitjacket would contravene [our] established practice of allowing the States wide

discretion, subject to the minimum requirements of the [Constitution], to experiment with solutions to difficult policy problems." *Id.* at 750.

Like the regimes at issue in *Bush*, *Chilicky*, and *Robbins*, the modification to *Miranda's* automatic exclusionary rule that Congress adopted in Section 3501 is proper because it too fully protects the underlying constitutional right: the citizen's right not to be compelled to be a witness against himself. Indeed, it protects the underlying right more fully than the regime at issue in *Bush*, since in that case the Court assumed that the legislative remedy for the constitutional violation at issue was "less than complete." 462 U.S. at 373. That cannot be said of Section 3501: Under the statute, statements found for any reason to have been involuntary *are always* inadmissible, thereby preventing the defendant from incurring *any* constitutional harm under the Self-Incrimination Clause.[8]

Congress of course has no authority to modify the content of constitutional rights whether directly or under the guise of its remedial powers. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). By the same token, we assume it could not abrogate a judicially devised protective measure essential to the survival of a constitutional right. But that is very different from saying that Congress likewise has no authority to modify a ruling that "overprotects" a constitutional right, as is clearly the case with *Miranda*'s automatic rule excluding all unwarned statements. *See, e.g., Oregon v. Elstad*, 470 U.S. at 306 (*Miranda* "sweeps more broadly than the Fifth Amendment itself"); *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring) ("the *Miranda* rule 'overprotects' the value at stake"). Overprotection *means* protection beyond what the Constitution requires. It is in precisely that area that Congress must be free to fashion or modify rules as it thinks wisest. *See Smith v.*

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[8] *See United States v. Balsys*, 118 S.Ct. 2218, 2232 n.12 (1999) ("Although conduct by law enforcement officials prior to trial may ultimately impair [the Self-Incrimination] right, a constitutional violation occurs only at trial") (internal citation omitted).

Robbins, 120 S.Ct. at 763 ("We address not what is prudent or appropriate, but only what is constitutionally compelled") (internal quotation omitted); *cf. Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959).

Indeed, if Congress had no role in making independent judgments about what the law should be once constitutional requirements are satisfied, it is difficult to see that it would have any role at all. Rules required by the Constitution and rules beyond those required by the Constitution together exhaust the universe of rules. If the judicial branch is empowered to establish for all time the latter as well as the former, then there is nothing left for Congress to do. *Cf. Boerne*, 521 U.S. at 535-36 ("Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches.").

In considering the legislation that became Section 3501, Congress balanced the costs and benefits of a rule excluding all unwarned confessions against the costs and benefits of allowing the trial court to decide on the facts of each case whether the suspect spoke voluntarily. It knew what is obvious, namely, that a court is distinctly less likely to find an unwarned statement to have been voluntary, but that sometimes the court would decide that other circumstances proved the statement's voluntary character. It also knew that there would be some cases where allowing the jury to hear that statement would be the difference between successful and unsuccessful prosecution of a dangerous criminal. Finally, it understood the damage to public confidence in the criminal justice system, not to mention the risk to public safety, that results when the jury reaches the wrong result because it is not allowed to hear highly probative evidence.

Weighing all these considerations, Congress concluded that the cost of slightly less police deterrence — that is, marginally diminished deterrence resulting from the significant risk (as opposed to the certainty) of excluding an unwarned confession — was outweighed by the benefits of admitting such a confession, so long as it is voluntary. Because Congress' modification of *Miranda*'s extraconstitutional and overprotective exclusionary

rule continues to forbid in all instances the government's use of involuntary statements, it fully affords defendants their rights under the Fifth Amendment, and thus is constitutionally sound.

The parties' answer to this argument depends on clouding the distinction between constitutional requirements and nonconstitutional protective measures. The strategy of this response is carried off with a virtual army of seemingly refined phrases — "constitutionally rooted," "of constitutional dimension" and the like — used to characterize *Miranda's* status.[9] But these characterizations turn out to be not so much refinement as equivocation impersonating refinement. They do nothing to resolve, and in fact seem designed to obscure, the fundamental incoherence of the parties' position: admitting that confessions obtained in violation of *Miranda* do not always amount to compelled self-incrimination, but maintaining nonetheless that it is unconstitutional for Congress to permit the admission of such statements even if they have been shown to be voluntary.

The parties' position rests on the implicit assumption that courts, in order to provide an additional shield for the exercise of a constitutional right, have the authority to invalidate an Act of Congress even if it is fully adequate to protect against the actual violation of that right. That, however, is precisely the authority the Court refused to exercise in *Bush* and *Chilicky*. In those cases, the Court found that Congress was in a better position than the courts to evaluate the costs and benefits of differing approaches, *Bush*, 462 U.S. at 387-90, and that the Court had "no legal basis that would allow [it] to revise [Congress's] decisions." *Chilicky*, 487 U.S. at 429.

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[9] The list is not unimpressive. We are, for example, told that the *Miranda* rules have "constitutional weight," "constitutional force," "constitutional underpinnings," "constitutional dimension," and "constitutional footings"; that they are "constitutionally based"; that they rest on "a constitutional basis," "a constitutional foundation," and "constitutional grounds"; and finally that they "implement and protect constitutional rights." Pet. Br. at 22, 23 25; Govt. Br. at 23, 25, Govt. Cert. Br. at 7-9, 16-17.

The same is true here. It is not possible through any feasible set of rules to assure that custodial questioning never becomes coercive. The only way to foreclose that possibility completely would be to prohibit custodial questioning altogether, just as the only way to provide complete assurance against violations of defendants' rights at trial would be to prohibit all prosecutions. The *Miranda* Court declined to impose either prohibition, and with good reason.

Because perfection is not possible, the effectiveness of laws intended to decrease the number of constitutional violations, the estimation of how many there are to be decreased, and the assessment of the cost to other values that one preventive rule or another is likely to impose, are necessarily matters of judgment and degree. "Congressional competence at 'balancing governmental efficiency and the rights of [individuals],' . . . is no more questionable" in the context of custodial interrogations than in other settings. *See Chilicky*, 487 U.S. at 425, *quoting Bush*, 462 U.S. at 389 (internal citation omitted); *see also Palermo*, 360 U.S. at 343 n.11 (discovery rules for criminal defendants). Accordingly, there is no more basis for disturbing Congress's judgment as to what measures are best designed to effectuate that balance fairly in this instance than there was in *Bush* or *Chilicky*.

C. The Application of *Miranda's* Rules in State Cases Does Not Demonstrate that the Rules are Constitutional Requirements

The parties acknowledge the Court's repeated statements that *Miranda's* rules are not themselves required by the Constitution and are not constitutional in character. Pet. Br. at 22-24; Govt. Br. at 21-26. They nonetheless contend that *Miranda*'s application to the States by implication must mean that the rules *are* constitutional in character.

The parties' contention on this point requires disregarding much of what the Court has said in numerous state cases concerning *Miranda*'s non-constitutional status in favor of an implication

concerning an issue that the parties in those cases did not even raise. The implication seems dubious for that reason alone. It would be unusual for the Court to have considered that issue *sua sponte* in reviewing the state cases, given its normal disinclination to go beyond the issues that the parties have presented. *See, e.g.*, *Michigan v. Mosley*, 423 U.S. 96, 100 (1975) ("Neither party in the present case challenges the continued validity of the *Miranda* decision . . . ."); *Minnick v. Mississippi*, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting) ("we have not been called upon to reconsider *Edwards* . . . .").

In any event, the implication about *Miranda*'s status that the parties seek to draw cannot be reconciled with the holdings of many of the very state cases they cite. As explained, *supra*, at pp. 8-9, the Court's decision to admit un-Mirandized but voluntary statements in *Quarles*, *Harris*, and *Hass*, all three of which were state cases, *turned* on the non-constitutional status of *Miranda*'s exclusionary rule. Similarly, the decision in *Oregon v. Elstad*, to admit a confession that was the fruit of an un-Mirandized earlier statement rests squarely on the ground that "a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." 470 U.S. at 306 n.1.[10]

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[10] The parties collect general language in several cases referring to the *Miranda* rules in constitutional terms. *See, e.g.*, Pet. Br. at 20 & n.9; Govt. Br. at 24-25. Such language is invariably dicta, however, set out in contexts in which the constitutional or nonconstitutional character of the rules was not an issue and no greater precision in expression was called for. None of the dicta purports to supersede more detailed statements about *Miranda*'s non-constitutional status in, for example, *Quarles* and *Elstad*, which is clearly part of the logic and holding of these decisions. Numerous other statements are to similar effect *See, e.g., Davis v. United States*, 512 U.S. 452, 457 (1994) (*Miranda* rights are "not themselves rights protected by the Constitution") (internal citation omitted); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (*Miranda* rules are "not themselves rights protected in the Constitution") (internal citation omitted); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights from government compulsion"); *Moran v. Burbine*, 475 U.S. 412, 424 (1986) ("As is now well established, the *Miranda* warnings

If the holdings in these cases are still good law, the most that could follow from the state review cases is that, in the absence of legislation taking a different approach, the Court has some authority to impose on the states nonconstitutional measures designed to protect constitutional rights. Of course we have not disputed that this is so. To the contrary, that theory lies at the heart of our explanation of the legal basis of *Miranda* as a form of constitutional common law — an explanation to which the parties fail to provide a coherent alternative.

To be sure, *Miranda*'s application to the States despite the fact that its rules are not constitutionally required implies that the Court has some authority to impose on the States measures that are not strictly constitutionally necessary, but are designed to assist in enforcing constitutional rights. This, of course, is hardly the revolutionary proposition the parties suggest. It is consistent with what the *Miranda* Court itself said on the subject, since for whatever else is in dispute about the decision, it is at a minimum clear that the Court believed that its specific rules were not constitutionally mandated and could be legislatively superseded by others. Thus, the recognition that the Court could impose nonconstitutional rules in the review of state cases provides no basis for the further step of inferring that Congress has no authority to modify those rules in federal jurisdiction.

Miranda is not the only instance in which the Court has found that it has this power. In addition to the cases discussed, *supra*, at pp. 10-12, the Court has engaged in a similar task in several other areas. One illustration is the Act of State doctrine, which bars federal and state courts from inquiring into the validity of the public acts of foreign governments. As explained in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964):

> The text of the Constitution does not require the act of state doctrine . . . . The act of state doctrine does,

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are not themselves rights protected by the Constitution") (internal quotation omitted).

> however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers . . . . [T]here are enclaves of federal judge-made law which bind the States . . . . [T]he act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution . . . .

376 U.S. at 423-24, 426-27. Like the *Miranda* rules, the Act of State doctrine is also subject to revision and restriction by Congress as a judicially developed, nonconstitutional rule, even while the Court's authority to craft it in the first instance is not seriously in doubt. *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 180-81 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).[11]

This in turn means that language in some cases outside the *Miranda* context that seems to suggest that the Court uniformly lacks the authority to impose nonconstitutional measures on the States has been overly broad.[12] Such language perhaps should

[11] Another illustration is the dormant commerce clause doctrine. This doctrine furthers the constitutional "right to engage in interstate trade," *Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (internal quotations omitted), by invalidating state laws that unduly burden or interfere with such commerce. The Court's decisions in this area are certainly "constitutionally based" on the Commerce Clause. Nonetheless, Congress is free to validate state actions that would otherwise be prohibited under the Court's decisions. *See, e.g., Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174-75 (1985); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 436 (1856).

[12] Many of these statements are also susceptible to more than one reading. For example, *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991), indicates that the Court's power over the states "is limited to *enforcing* the commands of the United States Constitution" (emphasis added). Of course, if the Court can "enforce" constitutional commands with non-constitutional prophylactic rules, as the *Miranda* doctrine indicates, then this statement provides no basis for concluding that the *Miranda* rules are somehow constitutionally required.

be read to be limited to circumstances where the measures being advocated are not sufficiently connected to the enforcement of a constitutional provision. That was the distinction the Court suggested in *Moran v. Burbine*, 475 U.S. 412 (1986). There the Court drew a line between *Miranda*'s prophylactic measures, which in its view could permissibly be imposed on the States — not because they were constitutionally required but because they were sufficiently closely connected to the protection of Fifth Amendment rights — and the rule the defendant was urging. *See id.* at 424-25. That rule would have excluded statements on account of police deception of an attorney seeking to represent a suspect who had agreed to talk voluntarily. The Court held that it could not impose that rule, because its lack of connection to the Fifth Amendment meant that its imposition would cross the line between a permissible prophylactic measure and an impermissible supervisory power exercise.[13]

[13] As a final argument supporting the constitutional character of the *Miranda* regime, the parties claim that it is analogous to various other rules promulgated by the Court that are said to "sweep more broadly than the constitutional right upon which they are based." Govt. Br. at 44; *see* Pet. Br. at 25-27. With one irrelevant exception, these analogies prove nothing of the sort. Instead, the cited rules, while prophylactic in the sense that they instrumentally guard against various evils, are constitutional *requirements* of the Due Process Clause or other constitutional provisions. *See generally* Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 188-89 (1988). For instance, it may be true that the evil guarded against by *North Carolina v. Pearce*, 395 U.S. 711 (1969) — vindictive increases in sentences and defendants' inhibitions from the fear of such increases — would not invariably occur otherwise. Nonetheless, the Court has held that, where the risk of the threatened evil is sufficiently grave, measures to prevent them must be observed as a matter of constitutional due process. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (holding that *Pearce* applies in two-tiered system because "[d]ue process of law *requires* that such a potential for vindictiveness must not enter into" the system) (emphasis added). In contrast, the *Miranda* rules cannot be understood as a due process requirement on a par with *Pearce*, because the Constitution does not bar the admission of un-Mirandized but voluntary statements.

The irrelevant example provided by the parties is *Michigan v.*

D. The Application of *Miranda's* Rules in Habeas Proceedings Does Not Demonstrate that The Rules Are Constitutional Requirements

The parties also claim that the application of the *Miranda* rules in habeas proceedings, s*ee Withrow v. Williams*, 507 U.S. 689 (1993), demonstrates that the rules are constitutional requirements. In *Withrow*, Dickerson asserts, the Court "rejected the government's argument that since the *Miranda* rules are not constitutional in character, but merely 'prophylactic,' federal habeas review should not extend to claims based on violations of these rules. *Withrow*, 507 U.S. at 690." Pet. Br. at 22 (internal quotation omitted).

This is true as far as it goes. What Dickerson neglects to mention, however, is that the Court made clear it was rejecting *not* the government's *premise* about the non-constitutional status of the *Miranda* rules, but rather the *consequence* the government argued flowed from that premise. The full paragraph reads as follows:

> Petitioner, supported by the United States as *amicus curiae*, argues that *Miranda*'s safeguards are not constitutional in character, but merely "prophylactic," and that in consequence habeas review should not extend to a claim that a state conviction rests on statements obtained in the absence of these safeguards. *We accept petitioner's premise for purposes of this case, but not her conclusion.*

507 U.S. at 691 (emphasis added). Moreover, also contrary to what Dickerson's brief suggests, the Court did not reject that conclusion for purposes of determining whether *Miranda* violations

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Jackson, 475 U.S. 625 (1986). But that case "simply superimpos[es] the Fifth Amendment analysis of *Edwards* [and related *Miranda* doctrine] onto the Sixth Amendment." *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). Because the *Jackson* rules are merely an offshoot of *Miranda*, they provide no independent guidance on interpreting the *Miranda* rules.

provided a sufficient *jurisdictional* basis for a habeas claim, a point petitioner declined to press at argument.[14] Rather, the question the Court decided was on what basis habeas review of such claims should proceed: under ordinary habeas standards, or the judicially-created rule of *Stone v. Powell*, 428 U.S. 465 (1976), imposing special extra-statutory limitations on review of Fourth Amendment habeas challenges.

This leaves the parties to argue that, despite its statement to the contrary, the *Withrow* Court must nevertheless have implicitly decided that the *Miranda* rules were constitutional; otherwise, instead of reaching the merits, the Court should have reversed the district court on jurisdictional grounds. This must be so, according to the parties, because federal habeas review of state court decisions is available only for claims that a person "is in custody in violation of the Constitution or the laws or treaties of the United States." 28 U.S.C. 2254(a). In their view, a *Miranda* violation "certainly does not involve laws or treaties," Pet. Br. at 22; *see* Govt. Br. at 24. Therefore, the only theory on which *Miranda* claims could be cognizable on habeas is if a *Miranda* violation were a violation of the Constitution.

As with their argument about *Miranda*'s application to the States, this means that once again the parties are arguing that the true holding of *Withrow* is the opposite of what the Court said was the premise of that holding. And as with that argument as well, the parties ignore an easy reconciling solution.

Contrary to the parties' hasty dismissal of the possibility, it seems far more likely that the Court's implicit finding of jurisdiction in *Withrow* rests on the proposition that *Miranda*, while not part of the Constitution, is part of the "laws of the United States," which for purposes of Section 2254(a), includes not only federal statutes but also decisional law designed to help effectuate the federal Constitution or statutes. *See generally* LARRY W. YACKLE, POST CONVICTION REMEDIES § 97, at 371 (1981 & 1996 Supp.) (concluding *Miranda* rules can be viewed as "federal 'law'

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[14] *See Withrow v. Williams*, No. 91-1030, tr. of oral argument at 12.

which, under the [habeas] statute, may form the basis for habeas relief"). That view was the one taken on the question at the time by the Department of Justice;[15] it accords with the interpretation the Court has given of the same phrase used in a similar context in the federal question jurisdictional statute, 28 U.S.C. 1331, *see National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850-51 (1985) (federal common law as articulated in rules that are fashioned by court decisions constitutes "laws" as that term is used in Section 1331); and it parallels the construction the Court gave to the words "laws of the several States" to include state decisional law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Thus, the cognizability of *Miranda* violations on habeas provides no basis for concluding that *Miranda*'s exclusionary rule is constitutionally required or immune from legislative modification.

E. Considerations of Stare Decisis Support Upholding Section 3501

Since, as the Court has held repeatedly, the *Miranda* rules are nonconstitutional, there is no need to overrule *Miranda* to uphold Section 3501. Rather, if the Court affirms the judgment below, it will ratify a statute that supersedes nonconstitutional case law rules while continuing to preserve both the constitutional right itself and the courts' ability to enforce that right. There is no affront to stare decisis in doing so, only a recognition that Congress has the final say on matters that the Constitution does not resolve.

On the other hand, holding Section 3501 unconstitutional could not avoid creating serious stare decisis difficulties. It would require overruling *Quarles*, *Harris*, *Hass*, and *Elstad* for starters, and indeed every one of the Court's cases whose judgment has

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[15] When *Withrow* was argued, the Deputy Solicitor General told the Court directly that *Miranda* could indeed be viewed as a "law" of the United States under the habeas statute. *See Withrow v. Williams*, No. 91-1030, tr. of oral argument at 15-16.

depended on the long-held view that *Miranda* provides only "a series of recommended procedural safeguards." *Tucker*, 417 U.S. at 444. It would also require the Court to retract statements in two recent cases that Section 3501 is "the statute governing the admissibility of confessions in federal prosecutions." *Davis v. United States*, 512 U.S. 452, 457 n.* (1994); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994) (upholding Section 3501(c)).[16]

The most one could say for the parties' argument is that the *Miranda* decision in some places apparently indicated that actual compulsion in violation of the Fifth Amendment necessarily occurs unless the *Miranda* procedures or other equally restrictive procedures are observed in custodial questioning. *See* 384 U.S. at 457-58, 467-74. As we have shown, however, this view was abandoned years ago. Hence, any "overruling" of the aspect of *Miranda* which might have implied immunity from legislative modification has already happened. As the government has conceded, "The Court has retreated from [the inherent compulsion] aspect of its reasoning in *Miranda*." Govt. Cert. Br. at 13-14; *see also Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (it weighs against following a precedent if "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine").[17]

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[16] The statement in *Alvarez-Sanchez* came at the urging of the government. *See* Br. for the U.S. at 32, *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994) (No. 92-1812) (urging the admission of a confession under Section 3501(c) and explaining that Section 3501(a) "requires the admission" of voluntary statements). In its earlier submission to the Court, the government did not address any of the complex severability issues that arise under its current position that the major provision of the statute is actually unconstitutional.

[17] It is also interesting that government asserts in its brief that for many years the *Miranda* rules have been stable, clear, and helpful to law enforcement, *see* Govt. Br. at 35, while in a footnote it reports that "[i]n many respects, the Court has tailored the *Miranda* doctrine as necessary to make it more workable." *Id.* at 35, n.25. A rule that has been changed

F. Policy Considerations Support Upholding Section 3501

Since stare decisis does not support the parties' attack on Section 3501, their accompanying analysis of policy considerations that allegedly support the *Miranda* rules is just that and nothing more: arguments of an essentially legislative nature as to why the *Miranda* rules are beneficial. In our constitutional system, arguments of this type are properly addressed to the legislature and afford no basis for invalidating a statute which is consistent with the Constitution.

Moreover, even considered on their own terms, the parties' arguments are unpersuasive. Even if it were true that *Miranda*'s procedures are on the whole beneficial to law enforcement, a question we address momentarily, it would not advance the parties' cause. First, for obvious reasons the parties do not even purport to say that *Miranda*'s automatic exclusionary rule, the only aspect of *Miranda* directly before the Court, has such beneficial effects. Second, nothing in 18 U.S.C. 3501 prevents or discourages law enforcement agencies from continuing to give *Miranda* warnings. As to the government's suggestion that *Miranda* is not a problem for federal law enforcement agencies, the overwhelming support for the court of appeals' decision by prosecutors and law enforcement organizations who have filed amicus briefs in this case – including representatives of federal law enforcement agents – suggests otherwise.

Indeed, contrary to the impression conveyed in the government's brief, the actual views of federal law enforcement agencies that have been lodged with the Court reveal serious difficulties with *Miranda*'s automatic exclusionary rule. While the brief reports that "federal law enforcement agencies have concluded that the *Miranda* decision itself generally does not hinder their investigations," Govt. Br. at 34, that conclusion appears to rest on the position of such agencies as the Internal Revenue

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in "many respects" is not the strongest candidate for rigorous application of stare decisis, and the frequent changes themselves attest to the problems *Miranda* creates.

Service and the Customs Service, which typically conduct non-custodial interviews, to which *Miranda* is inapplicable. *See, e.g., Beckwith v. United States*, 425 U.S. 341 (1976); *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997), *cert. denied*, 522 U.S. 1065 (1998). On the other hand, the Drug Enforcement Administration, which perhaps conducts a higher percentage of custodial interrogations than any other federal agency, concluded that the "methods used by DEA to investigate drug organizations highlight the need to reform the formal, prophylactic requirements of *Miranda*." Letter from Richard A. Fiano, DEA's Chief of Operations, to Frank A.S. Campbell (Oct. 13, 1999).[18] Similarly, the FBI reports that offshoots of the *Miranda* requirements, such as the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), have had "an impact on numerous FBI investigations." Letter from Larry R. Parkinson to Eleanor D. Acheson (Oct. 19, 1999). Moreover, while the government cannot conceal the fact that it opposed the *Miranda* rules at their inception, *see* Govt. Br. at 48 n.36, it neglects to mention that the Department has for many years supported the constitutionality of Section 3501. *See DOJ Report, supra*, 22 U. MICH. J.L. REF. at 520-21; Paul G. Cassell,

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[18] The Solicitor General lodged this correspondence with the Court on February 24, 2000. Curiously, one of the lodged documents is a letter from the DEA General Counsel's Office written just two days before the lodging. While supporting Section 3501, that letter conflicts in important respects with the views quoted above by DEA's Chief of Operations, Richard A. Fiano, which were written well before the filing of the government's brief. It should be noted that the DEA General Counsel's letter was written only *after* two United States Senators had attempted to obtain from the Justice Department the earlier written views of the DEA supporting Section 3501. *See* 146 CONG. REC. S760-02 (Feb. 24, 2000) (statement of Sen. Thurmond) (raising questions about why DEA's previous written position was not referenced in the Department's brief to the Court). Undersigned counsel also wrote the Department, seeking information about the views of the United States Attorneys in addition to the other law enforcement components whose opinions the Department has selected for disclosure. The Department, however, has declined to provide those views. So that the record may be complete on these issues, we will lodge this correspondence with the Court.

The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda, 85 IOWA L. REV. 175, 197-203 (1999); *see also United States v. Crocker*, 510 F.2d 1129,1136-38 (10th Cir. 1975) (upholding statute at government request).

Even apart from this information, the government's own brief admits that the *Miranda* system has harmed federal law enforcement, but claims those harms, which it avoids detailing, can be dealt with by other means. Stripped of euphemism, the government's position appears to be essentially as follows: (1) The Court should hold Section 3501 unconstitutional, thereby perpetuating *Miranda* in all respects; (2) The Court should thereafter ameliorate the harm resulting from its refusal to uphold the statute by overruling or modifying such decisions as *Edwards v. Arizona*, 451 U.S. 477 (1981). Govt. Br. at 35 (discussing considerations that would apply "should the Court be faced with reconsideration" of *Edwards* other cases); and (3) The Court should perhaps, in the future, further ameliorate the harm resulting from its refusal to uphold the statute by adopting a "good faith" exception to *Miranda*. Govt. Br. at 36 n.26.

Obviously, upholding Section 3501 would resolve the problems identified by the government. In contrast, the government's approach would require a repudiation of the current precedents in order to invalidate Section 3501, and would then require an overruling of additional precedents to deal with the resulting harm to law enforcement. As an approach supposedly dictated by respect for stare decisis, the course urged by the government is, to say the least, peculiar.

A final point about the Department's claim that *Miranda* has not harmed law enforcement is that Congress — the branch empowered to make such factual determinations — disagrees. After extensive hearings on *Miranda*'s real world effects, the Senate Judiciary Committee recommended adoption of Section 3501 because "the rigid and inflexible requirements of the majority opinion in the *Miranda* case are . . . extremely harmful to law enforcement." S. REP. 90-1097, 90th Cong., 2d Sess. at 46, *reprinted in* 1968 U.S.C.C.A.N. at 2132. This finding on an

"essentially factual issue" is "of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985).

If Congress's factual finding is correct, as the Court must assume, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion),[19] many dangerous criminals are escaping justice in the teeth of a federal statute that would permit their successful prosecution. And this stands to reason. Over time, a rule that automatically excludes voluntary confessions whenever there is a deviation from the *Miranda* regime is going to exact a significant toll on the system. The Court has recognized, for example, that "the task of defining 'custody' [under *Miranda*] is a slippery one, and policemen investigating serious crimes cannot realistically be expected to make no errors whatsoever." *Oregon v. Elstad*, 470 U.S. 298, 309 (1985).[20] One of the most worthwhile

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[19] Recent empirical scholarship also supports the congressional conclusion. *See* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (precipitous drop in FBI crime clearance rates after *Miranda*, as shown in Appendix A to this brief); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387 (1996) (before-and-after *Miranda* studies show drop in confession rates); *see also* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 871-76 (1994) (similar findings).

[20] The difficulties in defining "custody" should be enough to demonstrate that *Miranda*'s "bright line" rules are blurry and that, if anything, the *Miranda* rules actually increase litigation. Under *Miranda*, a federal court must determine (if requested by the defendant) both (1) *Miranda* compliance (including a determination that the suspect "voluntarily" waived his *Miranda* rights, *see North Carolina v. Butler*, 441 U.S. 369, 373 (1979)) *and* (2) the ultimate voluntariness of the statement. Even if the officer complied with *Miranda*, the Court must still consider a defendant's voluntariness arguments. *See Withrow v. Williams*, 507 U.S. 680, 693 (1993) (concluding "virtually all *Miranda* claims" can "simply be recast" as voluntariness arguments). On the other hand, if the officer

aspects of the statute is that it does not punish society when the officer fails to adhere to every aspect of *Miranda's* requirements but nonetheless treats the suspect in a way that assures courts — as both courts below felt assured — that the suspect's statement was voluntary. Thus, to the extent public policy considerations are relevant to the Court's conclusion, they support upholding Section 3501.

II. EVEN IF THE COURT IS EMPOWERED TO DEMAND SOME LEVEL OF PROPHYLAXIS BEYOND CONSTITUTIONAL REQUIREMENTS, SECTION 3501, TAKEN TOGETHER WITH OTHER PROVISIONS OF LAW, PROVIDES ADEQUATE PROTECTION

We have argued up to now that Section 3501 is a valid exercise of Congress' authority to modify *Miranda*'s extra-constitutional exclusionary rule. The parties disagree, effectively maintaining that Section 3501 is invalid because it violates a rule that in some sense is constitutional, and that even if Congress has a proper role, this particular statute fails to satisfy some additional requirement of prophylactic adequacy. Pet. Br. at 28-29; Govt. Br. at 27-29.

In this section, we demonstrate that the statute, taken together with the legal landscape that surrounds it, provides more than adequate protection to safeguard suspects from police compulsion. A word is useful at the outset, however, to address the premise of the parties' claim.

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violated *Miranda*, the court must typically still determine the voluntariness of the statement, since this governs its use for impeachment and derivative evidence purposes. Thus, the *Miranda* rules do not reduce the burden on the courts. *See DOJ Report*, *supra*, 22 U. MICH. J.L. REF. at 547-48 ("[There] is no reason to believe that [*Miranda*] has had any effect of reducing the volume of litigation relating to the admission of pretrial statements by defendants").

That premise is that the Constitution requires more than the Constitution requires. In particular, what the parties seek by insisting on *some* protection beyond the Constitution's text is for the Court to rewrite the Fifth Amendment to require the police *affirmatively to assist* the suspect in making what they view as a more enlightened, or at least a shrewder, decision about whether to talk. Imposing such an obligation on the police arguably would be a good idea; it would appeal to some as improving the fairness of the process, although it would disturb others as going too far in handicapping unobjectionable police work. In other words, it is precisely the sort of reasonably debatable policy choice that, because of its extraconstitutional character, is properly committed to popular, rather than judicial, judgment.

And that, we believe, is the crucial point for purposes of this case. For whatever else may be said of it, any obligation *affirmatively to assist* a suspect is not even arguably required by the Fifth Amendment as the Framers wrote it.[21] The Fifth Amendment simply forbids the police from *compelling* the suspect to talk. In other words, it prevents the police from in any way forcing, but not from causing, a confession. Causation can, certainly, escalate to the point of compulsion, but the parties have produced no evidence that this happens typically or even particularly frequently. When it does, Section 3501 provides the courts with the means to ferret it out and, by suppressing a statement that is *for any reason* found to be involuntary, deny the police any advantage they might have hoped to achieve by such behavior.

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[21] The same is true of the Fourth Amendment's ban on unreasonable searches. For example, the police need not inform a suspect of his right to refuse consent to a search, notwithstanding that the results of a search may be as thoroughly incriminating as a confession. Although where the suspect is in custody, his unwarned consent to the search should receive heightened scrutiny, it can nontheless be valid so long as it is voluntary under all the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227-47 (1973). Section 3501 virtually replicates this standard in the Fifth Amendment context.

Society might conclude that, notwithstanding the absence of a Fifth Amendment violation, a suspect's unwarned confession *should* be suppressed. Some states might decide — indeed several have already decided — that a failure to give warnings *does* warrant automatic suppression.[22] Others might adopt the middle course Congress chose in Section 3501, in which warnings are pointedly encouraged, but a failure to give them does not automatically require suppression. ARIZ. REV. STAT. ANN. § 13-3988. Still other states might opt, for example, to require video or audio recording; *see Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 591-93 (Minn. 1994), or to insure that any questioning be undertaken only in the presence of magistrate, *see* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 77 (1997). But we believe it beyond the proper reach of judicial authority and judicial competence, *see Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985), to ossify as a constitutional mandate any of these extraconstitutional policy choices.

In any event, Section 3501 — read in combination with other bodies of law providing criminal, civil, and administrative sanctions for coercion during interrogation, along with the Fifth Amendment's own exclusionary rule banning use of compelled statements — leaves in place a significant degree of protection for the exercise of a suspect's rights.

A. Section 3501 Contains Protective Measures Against Compelled Confessions

Section 3501 preserves much of the prophylactic value of *Miranda*'s exclusionary rule, albeit through a different and more refined mechanism. The statute requires that in making the voluntariness determination, the court "shall take into

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[22] *See, e.g.*, La. Const. Art. I, § 13. *See generally* BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW 1995 & 1999 Supp.) §§ 4.1 - 4.18 (describing independent state approaches to aspects of *Miranda* doctrine).

consideration all the circumstances surrounding the giving of the confession." 18 U.S.C. 3501(b). The statute also, however, specifically enumerates five factors that courts *must* consider. Among the most prominent of these is whether the suspect received *Miranda* warnings.

Specifically, Section 3501 directs the courts to consider the following when making voluntariness determinations:

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, *(3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel;* and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

18 U.S.C. 3501(b) (emphasis added).

The prominence that *Miranda* warnings enjoy in Section 3501 means that, if the Court upholds the statute, federal law enforcement officers will almost certainly continue to give them. They will do so for much the same reason as they do so now: self interest. Taking this precautionary measure will assist in obtaining a favorable ruling on the admissibility of the statement at trial, whereas failing to do so will make such a decision much less likely. *See Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) (Mirandized statements rarely found to be involuntary). Therefore, it is not surprising that in a footnote at the very end of its brief, the Department of Justice states categorically that whether *Miranda* or Section 3501 is the law, "Federal law enforcement agencies would, as a matter of policy, continue to comply with the warnings requirements of *Miranda*." *See* Govt.

Br. at 49 n.37.[23] This assurance provides real-world confirmation for the view of the court below that "nothing [in the statutory standard] provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings." J.A. 210. What is most likely to happen is that rather than reading warnings from *Miranda* cards, officers will read them from Section 3501 cards.

The parties nevertheless suggest that Section 3501 adds nothing to pre-*Miranda* law on the warnings question, citing various pre-*Miranda* cases in which courts also considered the presence or absence of warnings as a factor in voluntariness determinations. *See* Govt. Br. at 16 n.11. But at most all those cases show is that before *Miranda*, whether warnings were given was relevant evidence of voluntariness if the parties sought to have the court consider it. There is a significant difference between the prophylactic value of that occasionally vigilant system, and the rule of Section 3501, under which the judge *must consider in every case* whether the warnings were given. The incentives to warn that Section 3501 provides are much stronger than those in pre-*Miranda* law, since under the statute officers know that in every federal criminal prosecution the giving of the warnings will be an issue.

Section 3501 provides greater protection to suspects than pre-*Miranda* law in other ways as well. *See* FRED GRAHAM, THE SELF-INFLICTED WOUND 324 (1970) ("parts of [Section 3501]

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[23] This point alone creates considerable doubt about the parties' appeal to "transcend[ent]" factors as weighing against Section 3501, namely the "unique and important role" *Miranda* is said to have come to play in the nation's criminal justice system. Govt. Br. at 49; *see* Pet. Br. at 44. The subtext of this argument is that Section 3501 will be the death knell for *Miranda* warnings. Yet any federal officer who fails to give warnings will be taking a remarkably foolish risk, endangering the usefulness of the whole enterprise of questioning the suspect. Moreover, although state cases are not at issue here, the nation's leading law enforcement groups have filed *amicus* briefs indicating that they would continue to give *Miranda* warnings should the Section 3501 standards become applicable to their state officers.

would have been a progressive expansion of suspect's rights if Congress had passed it prior to *Miranda*"). Indeed, in at least one respect, Section 3501 extends protection beyond *Miranda* and current voluntariness caselaw standards. The statute directs the district court to consider whether the "defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of the confession." 18 U.S.C. 3501(b)(2). Under current law, no such inquiry is relevant in order to assess the voluntariness of a suspect's confession. *See Colorado v. Spring*, 479 U.S. 564, 577 (1987) (suspect's awareness of all the crimes about which he may be questioned is not relevant to determining the validity of his decision to waive the Fifth Amendment privilege).[24]

Contrary to the parties' claims, then, Section 3501 does not simply return the law of custodial interrogation to its pre-*Miranda* status. Rather, through the incentives it creates, it preserves the best prophylactic features of *Miranda* while eliminating its worst and most socially damaging rigidities. It thus produces a "win-win" regime, under which federal law enforcement officers will continue to deliver *Miranda* warnings to suspects, while in cases with technical disputes over *Miranda*

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[24] The government concedes that a suspect's awareness of charges "received less attention in this Court's pre-*Miranda* confession cases," Govt. Br. at 17, but claims that this factor was "referred to" in one case. *Id.* (citing *Harris v. South Carolina*, 338 U.S. 68, 69 (1949)). The government's brief inaccurately cites this reference as coming from a decision of the Court, rather than a mere *plurality* opinion. *See* 338 U.S. at 69 (Frankfurter, J. writing for three members of the Court); *id.* at 72 (Douglas, J., concurring). Thus, the government is unable to find even a single decision of this Court substantively discussing this factor as part of the pre- (or post-) *Miranda* voluntariness decisions. Clearly, then, some suspects will receive more protection under Section 3501 than under *Miranda* — *e.g.*, the respondent in *Colorado v. Spring*; *see also State v. Randolph*, 370 S.W.2d 741 (W. Va. 1988) (rejecting *Spring* under state law and suppressing confession because suspect not aware of suspected charges). Moreover, it is plausible that law enforcement agencies would respond to a favorable decision on Section 3501 by adding an additional warning to their "*Miranda*" cards addressing this point.

compliance (this case being a prime example, *see* J.A. 180-84), the suspect's statement will be admitted if, but only if, it is voluntary.

B. Other Protective Measures Against Compelled Confessions Have Expanded Considerably Since 1966

The interrogation practices of federal law enforcement officers are addressed not only in Section 3501, but also by other federal statutes and related bodies of law holding out the possibility of civil, criminal, and administrative penalties against officers who coerce suspects. Almost all this law was created or significantly expanded after *Miranda*. Thus, the legal incentives for non-coercive police questioning today are almost unrecognizably greater than when *Miranda* was decided.

Since 1966, civil penalties against federal officers who violate constitutional rights have become available. When *Miranda* was written, it was quite difficult as a practical matter to obtain damages in federal court from federal law enforcement officers who violated Fifth Amendment rights. *See Bell v. Hood*, 327 U.S. 678 (1946). That changed in 1971, with *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), in which the Court held that a complaint alleging that the Fourth Amendment had been violated by federal agents acting under color of their authority gives rise to a federal cause of action. Since then, courts have held that *Bivens* actions apply to abusive police interrogations. *See, e.g., Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) (allowing a *Bivens* claim under the Due Process Clause for police misconduct during custodial interrogation).

Likewise, when *Miranda* was decided, the federal government was effectively exempt from civil suits arising out of Fifth Amendment violations. At the time, sovereign immunity barred recovery for many intentional torts which might normally form the basis for such suits. *See* S. REP. NO. 93-588, *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791. After *Miranda*, Congress acted to provide that the federal government is civilly liable for

damages for conduct that could implicate Fifth Amendment concerns. In 1974, Congress amended the Federal Tort Claims Act to make it applicable "to acts or omissions of investigative or law enforcement officers of the United States Government" on any subsequent claim arising "out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h).

Supplementing these expansions of civil liability for coerced confessions is the enforcement of criminal law in the area. Thus, 18 U.S.C. 241 and 242 prohibit the deprivation of constitutional rights under color of law. While Congress adopted these statutes during the Reconstruction Era, post-*Miranda* cases now make clear these statutes apply to federal law enforcement officers, *United States v. Otherson*, 637 F.2d 1276, 1278-79 (9th Cir. 1980), who obtain coerced confessions, *see United States v. Lanier*, 520 U.S. 259, 271 (1997) (noting that "beating to obtain a confession plainly violates § 242") (internal citation omitted). Also, the Justice Department's Civil Rights Division and the FBI now more effectively support enforcement of these statutes against federal officials. *See generally* 28 C.F.R. § 0.50 (establishing Justice Department's Civil Rights Division).

Also, just last year, Congress adopted legislation requiring federal prosecutors (and, by extension, agents acting as their proxies) to comply with the state rules of ethics in the jurisdictions in which they practice. 28 U.S.C. 530B. A number of state ethics rules forbid contact with suspects who are represented by counsel, even during preliminary stages of an investigation. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2. The effect of Congress' action is to create a hybrid federal-state prophylactic rule restricting the opportunities for federal investigators to question suspects in ways that can extend well beyond *Miranda's* requirements. *Cf. Moran v. Burbine*, 475 U.S. 412 (1986).[25]

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[25] The provisions are highly controversial. *See, e.g., Ethical Standards for Federal Prosecutors Act of 1996: Hearing Before the Subcomm. on Courts of the House Judiciary Comm.*, 104th Cong., 2d Sess. 49 (1996) (statement of then-Associate Deputy Attorney Gen. Seth P.

The government also admits that the risk of Fifth Amendment violations is now less than at the time of the *Miranda* decision, acknowledging that "law enforcement agents today are generally better trained than they were in 1966." U.S. Br. at 48. This is, of course, only a part of the picture. As the Department of Justice has more fully explained in connection with the Fourth Amendment exclusionary rule, devices for preventing constitutional violations include not only better training but also

> specific rules and regulations governing the conduct of employees, and the use of investigative techniques such as searches and seizures; . . . institutional arrangements for conducting internal investigations of alleged violations of the rules and regulations; and . . . disciplinary measures that may be imposed for unlawful or improper conduct.

Dept. of Justice Office of Legal Policy, Report to the Attorney General on the Search and Seizure Exclusionary Rule, reprinted in 22 U. MICH. J.L. REF. 573, 622 (1989).

Finally, it is important to remember that the Fifth Amendment itself provides its own exclusionary remedy. Actual violations of the Fifth Amendment, as opposed to "technical *Miranda* violation[s]," *Quarles*, 467 U.S. at 668, will always lead to the exclusion of evidence.[26]

Waxman) (restrictions have "the potential to wreak havoc on federal law enforcement efforts"). Efforts are underway in Congress to amend or even repeal them. The provisions are significant, however, because they demonstrate Congress fully considers the need to protect criminal suspects in crafting legislation.

[26] While Section 3501 does not directly affect state cases, similar points can be made in relation to the adequacy of remedies and deterrents there. Available remedies and sanctions for actual Fifth Amendment violations by state officers include the constitutional exclusionary sanction, suits under 42 U.S.C. 1983 (which has been expansively interpreted since 1966), state tort suits, and criminal prosecution under 18 U.S.C. §§ 241, 242. In addition, if there is reasonable cause to believe that a pattern or practice of Fifth Amendment violations exists in a state or local law

C. Section 3501, Combined with Civil Rights Actions and Other Remedies, Creates a Constitutionally Adequate Alternative to the *Miranda* Rules

Taken together, the combination of Section 3501 and the changes outlined above to prevent coerced confessions — along with the Fifth Amendment's exclusion of involuntary statements — renders *Miranda*'s automatic exclusionary rule unnecessary. Unlike the *Miranda* rule, which "sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation," *Oregon v. Elstad*, 470 U.S. 298, 306-10 (1985), the civil and criminal sanctions adopted by Congress focus more directly on conduct that squarely implicates the Fifth Amendment proscription against compelled self-incrimination. At the same time, they provide stronger remedies against federal agents who coerce confessions than does the *Miranda* exclusionary rule. The exclusion of evidence of course "does not apply any direct sanction to the individual official whose illegal conduct" is at issue. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). In contrast, civil remedies directly affect the offending officer. Similarly, civil actions against the United States provide a tangible financial incentive to insure that federal practices comport with constitutional requirements. Training and internal disciplinary actions against federal agents must also be considered an important part of the calculus. Thus, "[b]y all appearances," Congress, the Executive (and the Court in *Bivens*) have "already taken sensible and reasonable steps to deter [Fifth] Amendment violations by" police officers, and "this makes the likely additional deterrent value of the [*Miranda*] exclusionary rule small." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1049 (1984).

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enforcement agency, the Attorney General has the authority to seek systemic injunctive and declaratory relief under 42 U.S.C. 14141 (adopted in 1994). Moreover, the federal judiciary, through direct appeals and habeas proceedings, can review all state court voluntariness determinations. *See Miller v. Fenton*, 474 U.S. 104 (1985).

The parties do not challenge our contention that the combination of Section 3501 and the other measures we have identified provides as much prophylactic protection as the *Miranda* rules against actual Fifth Amendment violations. Their only response is contained in a footnote in the government's brief. Govt. Br. at 28 n. 20. The government maintains that, even assuming this combination is *more* effective than *Miranda* in preventing such violations, it still cannot be preferred. Relying on language from *Miranda*, the government contends that alternatives must be shown to be "at least as effective [as *Miranda*] in apprising the accused persons of their rights of silence and in assuring a continuous opportunity to exercise it." Govt. Br. at 27 (*quoting Miranda*, 384 U.S. at 467).

This language obviously was not necessary to the decision in *Miranda*. *Compare Harris*, 401 U.S. at 224 ("Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling.") Moreover, these statements cannot be reconciled with the present understanding of *Miranda*.

Miranda's various statements about the need for equally effective alternatives cited by the parties all occur in those parts of the opinion where the Court seems to be saying that any statement obtained without a prior explanation to the defendant of his rights is necessarily compelled. But as we explain *supra* at pp. 8-9, *Quarles*, *Harris*, and *Hass* make it clear that those portions of *Miranda* are not good law, since in each case, suspects' statements were found voluntary and admissible despite having been obtained without either compliance with *Miranda* or any "equally effective" alternative to make sure the suspects were aware of their rights.

Once those portions of *Miranda* fall, the force of the "equally effective" langauge falls with it. The Court would only have the authority to insist on warnings or their equivalents if the admission of a statement obtained without these measures would violate the Constitution. Under the only interpretation

of *Miranda* that can be squared with *Quarles*, *Harris*, and *Hass*, that is not the case. The surviving justification for a "warnings or equivalent" requirement, and thus the one informing how that "requirement" should be interpreted today, is instead to help prevent future Fifth Amendment violations. In that case, however, other prophylactic measures that provide equivalent protection against the use of actually compelled statements are constitutionally sufficient even if they do not provide equivalent assurance that the suspect was informed of his rights. *Cf. Smith v. Robbins*, 120 S.Ct. at 759 (upholding against constitutional challenge an alternative to *Anders* procedure that provided protection for the constitutional right at issue at least as good as that contained in *Anders*). In other words, the *Miranda* Court's authority to order Congress to enact (if it was to enact anything) a regime mostly identical in terms of warnings to the one the Court devised has been undermined by the Court's own understanding, evident in its more recent cases, that the regime itself was never constitutionally mandated.[27]

A final reason for upholding the statute is the Court's traditional reluctance "to avoid imposing a single solution on [the Congress and] the States from the top down." *Smith v. Robbins*, 120 S.Ct. at 750. So far as custodial police questioning is concerned, the law has remained immobilized in *Miranda*'s 1960's gaze, as foreseen by *Miranda*'s dissenters. *See* 384 U.S. at 524 (Harlan, J., dissenting) ("[d]espite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap serious efforts at reform."). Today police do not

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[27] Finally, we would note that even if *Miranda* could somehow insist that any substitute for its regime be "at least as effective" in assuring that suspects are advised of their rights, we believe Section 3501 would actually satisfy that standard, or at least that there is sufficient reason to believe that it would, that this Court should defer to Congress' judgment on that point. *Cf. Bush*; *Chilicky*. Since the judgment of the court of appeals over a year ago upholding Section 3501 in the Fourth Circuit, it does appear that in practice, Section 3501 has indeed been at least as effective as the *Miranda* regime.

generally use such potentially desirable reforms such as videotaping. No doubt such alternatives could be made more appealing to legislators and administrators if some trade-off were allowed in relaxing features of the *Miranda* system not required by the Constitution and detrimental to law enforcement. More than three decades of experience, however, shows that it is impossible as a practical matter to explore such alternatives under the *Miranda* regime. As the Court has warned in other contexts, "'[J]udicial imposition of a categorical remedy . . . [has] pretermit[ted] other responsible solutions being considered in Congress and state legislatures.'" *Smith v. Robbins*, 120 S.Ct. at 758 (*quoting Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (Kennedy, J., concurring in the judgment)).

III. IF CONGRESS CANNOT ALTER *MIRANDA*'S IRREBUTTABLE PRESUMPTION, THIS COURT SHOULD

If, contrary to our submission, the Court concludes that congressional modification of *Miranda* was impermissible, the Court should nevertheless affirm the Fourth Circuit's judgment by making its own modification to *Miranda*. Specifically, it should abandon the irrebuttable presumption that confessions obtained without compliance with the *Miranda* procedures are always involuntary, and instead make clear that that presumption may be rebutted. Such a modification would then permit the Court to uphold the constitutionality of Section 3501.

Modification of *Miranda* in this fashion would bring that case into harmony with the principles of the Court's landmark decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). There, the Court distinguished between permissible prophylactic measures adopted to remedy or prevent unconstitutional actions, and impermissible attempts to rewrite constitutional protections disguised as prophylactic or remedial measures. For a prophylactic measure to be upheld as truly remedial or preventive, there must be "congruence and proportionality between the injury to be

prevented or remedied and the means adopted to that end." *Id.* at 508; *see Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000). In its current form, *Miranda*'s prophylactic regime does not satisfy these requirements. If, however, the Court modifies that regime to allow rebuttal of the currently irrebuttable presumption of involuntariness covering all non-complying custodial confessions, the modified regime would be consonant with *Boerne*.

A. *Miranda*'s Irrebuttable Presumption Is Not Congruent and Proportional to the Problem of Involuntary Confessions

In *Boerne*, the Court held that there are significant limits even on Congress' power to devise remedial measures.[28] Otherwise, the power to enforce the right at issue would be transformed into the power to make "a substantive change in constitutional protections." *Id.* at 532. To insure against rewriting the Constitution in the guise of remediation, the Court has considered whether a response is "out of proportion to its supposed remedial . . . objectives." *Kimel*, 120 S.Ct. at 644.

Miranda's rules are out of proportion because they "prohibit[] substantially more" police practices than would "likely be held unconstitutional under the applicable" Fifth Amendment standard. *Id.* at 647. To be sure, confessions obtained without complying with *Miranda*'s procedures may sometimes be

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[28] Because Congress has Section 5 "enforcement" power under the Fourteenth Amendment, as well as the power to craft "necessary and proper" legislation under U.S. CONST., art. I, § 8, its authority to craft prophylactic measures is presumably broader than the Court's. *Compare Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966) (upholding congressional ban on literacy tests) *with Lassiter v. Northampton Bd. of Elections*, 360 U.S. 45, 51-54 (1959) (Court refuses to strike down literacy tests under its own authority to enforce the Equal Protection Clause). Because, as we show in this section, even *Congress* could not apply *Miranda*-style prophylactic legislation to the States under *Boerne*, this case does not present the important question of how much narrower the Court's power to craft prophylactic rules may be.

involuntary. But there is little reason to believe that this will be true all the time or even most of the time:

> In case after case, the courts are asked . . . to decide purely technical *Miranda* questions that contain not even a hint of police overreaching. And in case after case, no voluntariness issue is raised, primarily because none exists. Whether the suspect was in "custody," whether or not there was "interrogation," whether warnings were given or were adequate, whether the defendant's equivocal statement constituted an invocation of rights, whether waiver was knowing and intelligent — this is the stuff that *Miranda* claims are made of. While these questions create litigable issues under *Miranda*, they generally do not indicate the existence of coercion . . . sufficient to establish involuntariness.

Withrow v. Williams, 507 U.S. at 709-10 (O'Connor, J., dissenting) (collecting numerous illustrations). In this very case, for example, the district court found *Dickerson*'s unwarned statements voluntary under the Fifth Amendment. J.A. 158 n.1.[29]

Miranda's lack of proportionality is shown not only by its overbroad reach in particular cases, but also by its unlimited application. *Miranda*'s automatic exclusionary rule applies to every episode of custodial questioning conducted by every level of government, federal, state, and local, numbering in the hundreds

[29] The voluntariness of the statements in this case is typical of *Miranda* violations that have reached this Court over the years. *See, e.g., United States v. Green*, 504 U.S. 908 (1992) (No. 91-1521) (statement specifically found to be voluntary below, *see* 592 A.2d 985, 986 n.2 (D.C. 1991)), *cert. dismissed*, 507 U.S. 545 (1993); *Oregon v. Elstad*, 470 U.S. 298, 315 (1985) ("It is beyond dispute that respondent's earlier [un-Mirandized] remark was voluntary"); *Oregon v. Hass*, 420 U.S. 714, 722 (1975) ("There is no evidence or suggestion that Hass' statements to [police]. . . were involuntary or coerced."); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) ("the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination").

of thousands each year. It is not limited to a particular period of time or to jurisdictions with a particular history of abuse. It contains no mechanism for a jurisdiction to extricate itself by showing that it has had a long history of compliance with the Self-Incrimination Clause. *Cf. Boerne*, 521 U.S. at 533 (commenting favorably on the presence of such devices as a means of assuring proportionality). The "indiscriminate scope" of the rules is itself strong evidence that they are disproportionate. *Kimel*, 120 S.Ct. at 650.

Finally, *Miranda*'s irrebuttable presumption is disproportionate in another sense as well: it rigidly excludes confessions obtained without compliance with *Miranda* regardless of any other circumstances. This can lead to "disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule [that] is contrary to the idea of proportionality that is essential to the concept of justice." *Stone v. Powell*, 428 U.S. at 491.

The Court has also looked to the scope of the problem Congress is addressing when considering the breadth of prophylactic rules. The scope of the problem to which *Miranda* was responding remains unclear, but the evidence of epidemic police abuse was, and is, quite limited. *Miranda* did refer to "anecdotal evidence" concerning abusive police interrogation, *id.* at 645,[30] which no doubt was a problem in exceptional cases before *Miranda* — just as it remains a problem in some exceptional cases today. But the bulk of the justification in the opinion came

[30] Interestingly, *Miranda* did not cite any contemporary cases in which the police had extracted a confession through threatened force. For this point, it relied on such dated information as the Wickersham Report in 1931 and a few Supreme Court cases in the 1940s and early 1950s. 384 U.S. at 445-46. *Miranda* went on to conclude that police coercion "is not, unfortunately, relegated to the past or to any part of the country," *id.* at 446, resting this assertion on a few additional isolated and dated reports. *Id.* The Court conceded, however, that "the examples given above are undoubtedly the exception now." *Id.* at 447.

from an examination of "police manuals and texts" on techniques for questioning suspects. *Miranda*, 384 U.S. at 448. The difficulties with this material as evidence of pervasive coercion in custodial interrogations, however, are legion. *See generally id.* at 532-33 (White, J., dissenting). In fact, the *Miranda* majority acknowledged that it had little idea about typical practices. *Id.* at 448. Moreover, while the police manuals were offered as evidence of compulsion, the *Miranda* court in fact concluded only that they created the "potentiality for compulsion." *Id.* at 457. Thus the opinion in effect admitted its failure to demonstrate that the techniques and circumstances it characterized as giving rise to potential compulsion pervasively resulted in *actual* compulsion.[31] Nor is that particularly surprising, for it is clear that the *Miranda* Court's true concern was with the potentially coercive circumstances themselves, not with actual compulsion — just as it is clear that "[the 103d] Congress' concern was with the incidental burdens imposed" on religion by neutral laws, not with "deliberate persecution." *Boerne*, 521 U.S. at 531-32.

[31] It is also noteworthy that both the executive and legislative branches reached their own conclusions, contemporaneously with *Miranda*, that coercion as traditionally understood was not pervasive in custodial interrogations. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967) (stating, based on pre-*Miranda* data, that "today the third degree is almost nonexistent"); S. REP. 90-1097, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2134 (1968) (reviewing congressional testimony from expert witnesses on lack of coercive techniques and concluding *Miranda*'s contrary findings were based on an "overreact[ion] to defense claims that police brutality is widespread"); *see generally* Cassell, Miranda's *Social Costs, supra*, 90 Nw. U.L. Rev at 473-78 (collecting evidence on limited number of involuntary confessions in 1966).

B. Changing *Miranda*'s Irrebuttable Presumption to a Rebuttable One Would Create a Remedial Measure Congruent and Proportionate to the Problem of Coercive Police Conduct

The lack of congruence and proportionality between *Miranda*'s rules and Fifth Amendment violations can be cured by changing *Miranda*'s irrebuttable presumption to a rebuttable one. Today, the "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion" which is "irrebuttable for purposes of the prosecution's case in chief." *Oregon v. Elstad*, 470 U.S. at 307. In other contexts, such rigid presumptions are typically justified on the ground that they "avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991).[32] Here, however, the presumption operates to achieve incorrect results in many cases.

"Per se rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Id.* Under *Kimel* and *Boerne*, the present irrebuttable presumption creates a jarring lack of "congruence and proportionality." Indeed, to apply an irrebuttable presumption is effectively to change the Fifth Amendment's compulsion standard to a new, warnings-and-waiver standard, thus "alter[ing] the

[32] Per se rules are also sometimes justified on the grounds that exceptions are not sufficiently "important to justify the time and expense necessary to identify them." *Coleman*, 501 U.S. at 737 (internal quotation omitted). This rationale has no application here. Congress has determined to the contrary that the judiciary should devote such additional energy as may be needed (if any) to making accurate (rather than presumptive) voluntariness determinations in federal criminal cases. Moreover, because confessions are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran v. Burbine*, 475 U.S. 412, 426 (1986), individualized voluntariness determinations will be time well spent.

meaning" of the Fifth Amendment, *Boerne*, 521 U.S. at 519, and "substantively redefin[ing] the State's legal obligations" during custodial interrogation, *Kimel*, 120 S.Ct. at 648. *See generally* J. GRANO, *supra*, at 198 (*Miranda* "substituted for the constitutional rule a new substantive rule of its own making").

These problems would be substantially resolved if this Court modifies *Miranda* so that it operates as a rebuttable presumption — that is, confessions taken without following the *Miranda* procedures would be presumed involuntary unless the state can prove otherwise. Justice Clark suggested this approach in his dissent in *Miranda* as an intermediate position between the majority and the other dissenters. He proposed that "[i]n in the absence of warnings, the burden would be on the State to prove . . . that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary." 384 U.S. at 503 (Clark, J., dissenting).

This allocation of burdens, superimposed on Section 3501 (which can easily be read in this fashion[33]), brings Section 3501's prophylactic effect even closer to that of *Miranda*'s exclusionary rule by explicitly conferring a preferred status to confessions obtained in compliance with *Miranda*. At the same time, it eliminates the single feature of *Miranda*'s irrebuttable presumption most objectionable under *Boerne*: the imposition of a standard for the admissibility of custodial confessions more stringent than the constitutional voluntariness standard, and the attendant automatic exclusion of many statements that in fact comply with the constitutional standard. In contrast, a rebuttable presumption would be a proportionate response to the various risks identified by the *Miranda* Court. It would also preserve the assistance to the courts that the *Miranda* factors have provided in structuring to the voluntariness inquiry, while bringing to an end the irrationally mechanical application of those factors to exclude

[33] Section 3501(a) provides that a confession "shall be admissible in evidence *if* it is voluntarily given" (emphasis added), implying that the presumption is against admissibility unless and until voluntariness is established.

unwarned confessions, no matter what the circumstances, even when the confession is unquestionably voluntary.

In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court performed a similar modification to a test it had previously suggested but came to regard as overly rigid. In *Gates*, the Court rejected the two-pronged "*Spinelli-Aguilar*" test for determining probable cause in favor of a totality-of-the-circumstances approach. Raising a concern that applies equally to the *Miranda* doctrine, the Court explained that "the 'two-pronged test' has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts . . . ." *Id.* at 234-35. Yet, in restoring the totality-of-the-circumstances approach, the Court emphasized that the *Spinelli-Aguilar* factors remained "highly relevant" in determining probable cause, *id.* at 230, and later cases have examined them, *see Alabama v. White*, 496 U.S. 325, 328 (1990). Thus, just as the *Spinelli-Aguilar* factors now serve "not as inflexible, independent requirements applicable in every case," but rather as "guides to a magistrate's determination of probable case," *Gates*, 462 U.S. at 230, so too the *Miranda* factors would guide determination of voluntariness issues.

Changing the *Miranda* presumption to a rebuttable one would not merely return the law to its pre-*Miranda* state. When *Miranda* was decided, the constitutional assignment of the burden for establishing voluntariness was unclear. *See Developments in the Law — Confessions*, 79 HARV. L. REV. 938, 1069-70 (1966) (noting majority rule that state proves voluntariness and minority rule that defendant proves involuntariness).[34] A rebuttable *Miranda*

[34] The issue has been clarified, but not been definitively resolved, after *Miranda*. *Lego v. Twomey*, 404 U.S. 477, 489 (1972), definitely suggests that the prosecution must prove voluntariness. *See generally* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 10.3(c) at 429 (2d ed. 1999) (noting *Lego* "raises serious doubts" about placing burden on defendant to prove involuntariness). But some states continue to place the burden on the defendant to show involuntariness. *See, e.g., Chambers v. States*, 742 So.2d 466, 476 (Fla. Dist. Ct. App. 1999).

presumption could be crafted that would place the burden on the government to establish voluntariness while making delivery of *Miranda* warnings an important part of the calculus.

The parties spend little time justifying the inflexibility of the *Miranda* rules, relying instead almost exclusively on a general argument against overruling *Miranda*. But the irrebuttable presumption that underlies the automatic exclusionary rule has been effectively repudiated by cases such as *Quarles* and numerous others we have discussed. Even without that doctrinal development, however, there would be ample grounds for changing the inflexible presumption. "*Stare decisis* is not an inexorable command" and "[t]his is particularly true in a constitutional case." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). "The justifications for the case system and stare decisis must rest upon the Court's capacity, and responsibility, to acknowledge its missteps." *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 914 (2000) (Kennedy, J., dissenting). Most importantly, "when governing decisions are . . . badly reasoned, this Court has never felt constrained to follow precedent." *Payne*, 501 U.S. at 827 (internal quotation omitted).

This criticism applies with special force to the *Miranda* decision. That 5-to-4 decision was flatly in conflict with 180 years of common law and constitutional history, and with substantially all prior judicial precedent, which required the suppression of pretrial statements only in cases involving actual compulsion by the government, and explicitly rejected the complex of procedural rules that *Miranda* imposed. *See DOJ Report*, *supra*, 22 U. MICH. J. L. REF. at 453-84, 491-506. Against that backdrop, stare decisis provides no basis for preserving the anachronistic, yet sweeping and irrebuttable, presumption that anchors *Miranda*'s exclusionary rule.

* * * * *

The parties close their briefs with an appeal to "transcend[ent]" factors allegedly arguing against Section 3501,

namely what is said to be the "important role" *Miranda* has come to play in maintaining confidence in the nation's criminal justice system. Govt. Br. at 49; *see* Pet. Br. at 44. We agree that important factors are at stake here, but they argue for upholding the statute.

Foremost among these factors is the importance of the search for truth. "The central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (internal quotation omitted). Public confidence in the criminal justice system cannot possibly be enhanced by a rule that conceals from the jury truthful and voluntarily given confessions. Public confidence cannot be enhanced by the result of that concealment, namely, a significantly increased risk that an admitted criminal will go free. Public confidence cannot be enhanced by a rule that turns its back on discovering the facts in favor of an irrebuttable presumption that is always slanted and often wrong. And lastly, with all due respect to *Miranda*, public confidence cannot be enhanced by a ruling of this Court bottomed on the 1960's view that law enforcement officers are so much to be distrusted that the law of confessions will start by presuming their penchant for lawless, strong-arm tactics.

Public confidence is, instead, best served by permitting citizens to give voice to their views through their elected representatives. By substantial bi-partisan majorities, those representatives adopted Section 3501 precisely for the purpose of changing *Miranda*'s automatic exclusionary rule while preserving a strong incentive to continue advising suspects of their rights. This judgment was in our view balanced and wise, but for however that may be, it fully honored the requirements of the Fifth Amendment and thus merits this Court's approval.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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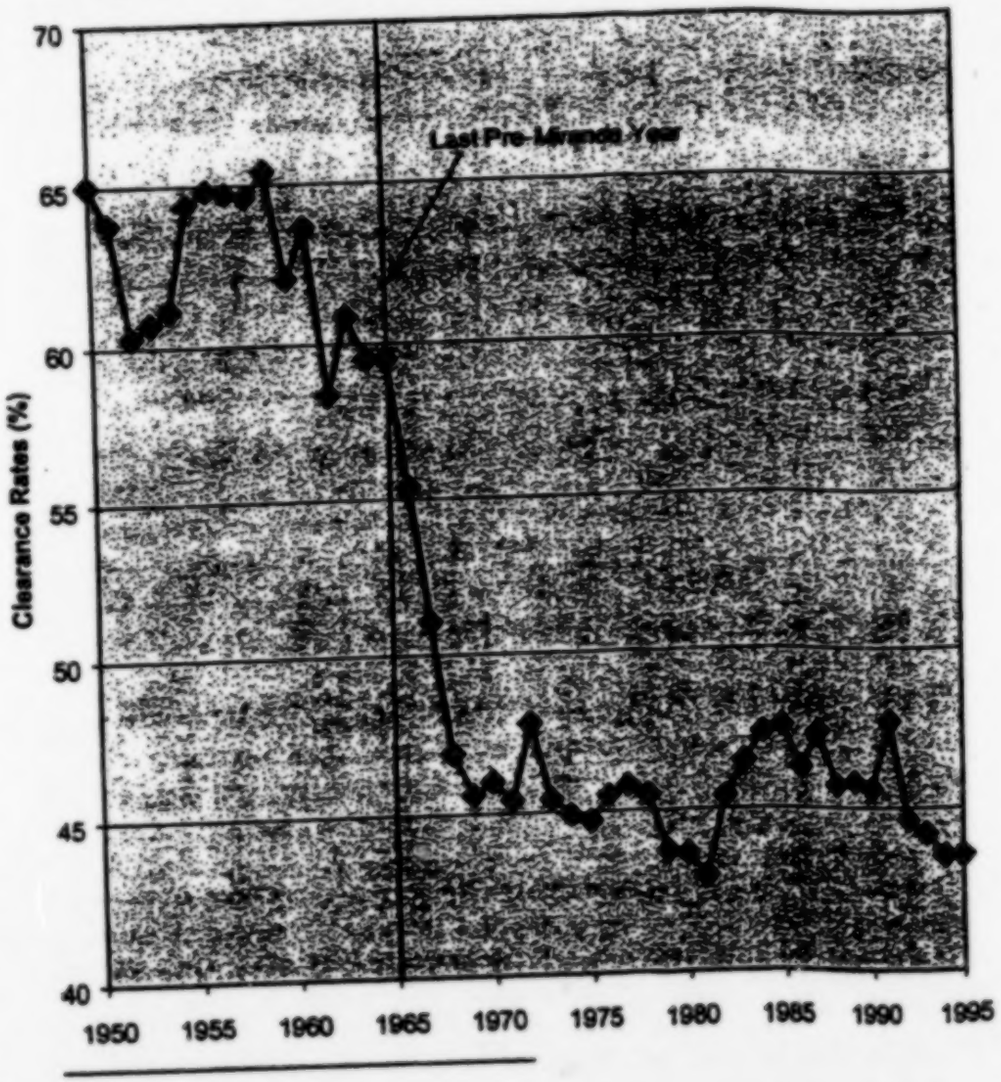
Appendix A

Figure 1 - Violent Crime Clearance Rates from 1950 to 1995



This chart, which depicts the Violent Crime Clearance Rates from 1950 to 1995, is reproduced in Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1069 (1998), and is based on information gathered from the *Federal Bureau of Investigation, Uniform Crime Reports* published over the various years.

APPENDIX B

1. The Fifth Amendment of the United States Constitution provides in relevant part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."

2. Section 3501 of Title 18 provides as follows:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the abovementioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other official empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other official beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.